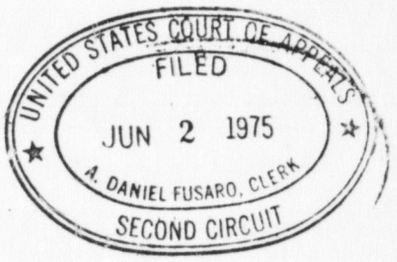
United States Court of Appeals

for the Second Circuit

MOTION TO DISMISS



UNITED STATES COURT OF APPEALS
FOR THE 2nd CIRCUIT

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In the Matter of : No. 75-5009

M. E. GREEN CO., INC., : 75-5009

BANKRUPT. : NOTICE OF MOTION
TO DISMISS APPEAL

- x

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of MARTIN SZOLD, duly sworn to the 2nd day of June 1975 the undersigned will move this Court for an Order granting the following relief:

1. Dismissing the appeal herein.

2. Denying appellant leave to appeal.

3. In the alternative, requiring appellant to post a bond in the sum of $50,000.

Dated: June 2, 1975

Yours, etc.

SZOLD, SCHAPIRO & COSTER

By: _____
Martin Szold
342 Madison Avenue
New York, New York 10017
(212) 661 - 1560
Attorneys for Appellee
MICHAEL E. GREEN

To: CAHILL, GORDON & RENDEL, ESQS.
Counsel for Trustee-Appellee
80 Pine Street
New York, New York 10005

continued

ALEX L. ROSEN, ESQ.
Attorney for Appellant
225 Broadway
New York, New York 10007

KURZMAN & FRANK, ESQS.
Attorney for Appellee Harry Green
230 Park Avenue
New York, New York 10017

ERWIN E. CORWIN, ESQ.
Attorney for Appellee Zelda Cohen
50 East 42nd Street
New York, New York 10017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of

M. E. GREEN CO. INC.,

Bankrupt.

No. 75 - 5009

AFFIDAVIT IN OPPOSITION TO APPELLANT'S MOTION AND IN SUPPORT OF APPELLEES' MOTION

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

MARTIN SZOLD, being duly sworn, deposes and says:

1. I am the attorney for MICHAEL E. GREEN, an appellee in this Court. My client was involved in a certain settlement agreement which was approved by Bankruptcy Judge EDWARD J. RYAN, by order dated January 21, 1975. The order of JUDGE RYAN approving the compromise and settlement of claims in the Bankruptcy Court was the subject of an appeal to the District Court before Hon. INZER B. WYATT. The appeal heard by JUDGE WYATT resulted in an order affirming the determination of JUDGE RYAN.

2. This affidavit is submitted in opposition to the appellant's motion for supersedas which is in effect a motion for leave to appeal and for a stay, and also in support of appellees' motion to dismiss the appeal; or in the alternative, to require that appellant comply with the Federal rules of appellate procedure by filing a bond or undertaking as required, under Rule 7, and in addition thereto, that appellant be required to post a bond or undertaking pursuant to FRAP 38,

to compensate appellees for damage they will sustain as a result of this appeal which, in deponent's opinion, is frivolous in the extreme.

3. From this order of affirmance, the appellant, HARRY SILVERMAN, the sole objectant to the settlement in the Bankruptcy Court, appeals to this Court. It is significant to note, however, that in the District Court, a motion was made on behalf of deponent's client to dismiss the appeal in the District Court. This motion to dismiss the appeal was decided by JUDGE MILTON POLLACK, who dismissed two of the three items set forth in the appellant's Notice of Appeal to the District Court. Annexed hereto and made part hereof, marked Exhibit "I", is a copy of the Memorandum Decision and Order of JUDGE POLLACK. The order of JUDGE POLLACK dismissing two of the three parts of the appeal is not and cannot be the subject of an appeal to this Court since the time to appeal from the Order of JUDGE POLLACK has expired, and appellant has not filed a Notice of Appeal from the determination of JUDGE POLLACK. The determination of JUDGE POLLACK dismissing two of the three parts of appellant's appeal is therefore final, binding and conclusive.

4. Notwithstanding the finality of JUDGE POLLACK's Order, deponent notes that appellant's Form C Pre-Argument Statement states that he proposes to raise issues on this appeal which were part of the dismissal order of JUDGE POLLACK.

AS TO THE DISMISSAL SOUGHT BY APPELLEES

5. Dismissal of the instant appeal is sought on two grounds: Firstly, it appears that the appellant, HARRY SILVERMAN, has no standing to appeal to this Court. The appellant is not affected, directly or otherwise, by the Order appealed from. He claims to be a general creditor and as such, his only interest in the proceedings below is an alleged claim that his dividend, if any, in the bankruptcy proceeding (assuming he would be a party entitled to receive one) could possibly be diminished. Otherwise stated, appellant contends that if the settlement is not consummated below and the various claims and counter-claims are fully litigated, a possibility exists that a dividend, if any, payable to him in the bankruptcy proceeding, would be greater.

6. Apart from this contention relating to a dividend, appellant has no interest whatsoever in the settlement approved by JUDGE RYAN and approved upon review by JUDGE WYATT. This is not a case where a judgment was obtained against appellant, where his property was taken or where there is any direct adverse effect which would give appellant standing to appeal to this Court. There will be submitted together with this affidavit a brief attesting to the law on the subject, and showing that appellant has no standing to appeal merely because he claims to be a general creditor.

7. Of great significance in the total picture is the fact that the Trustee has a most substantial claim against appellant, and

deponent believes that the sole motive for objecting to the settlement is appellant's fear that the disposition of all other claims and counterclaims will leave the way clear for the Trustee's action against appellant. The proceedings below in relation to the settlement have now consumed the better part of a year and a half, because of the dilatory tactics employed by appellant, and have resulted by his actions in forestalling the trial of the case against him. In any event, it is clear that appellant does not have standing to appeal.

8. The District Court Judge, HON. INZER B. WYATT, in determining the appeal from the Bankruptcy Court, decided the case on the merits. The District Court Judge could have decided the case on standing, but specifically chose not to do so without making any finding on the subject.

9. Deponent respectfully submits that the determination by the District Court Judge on the merits, does not constitute a waiver of the issue of standing, since the issue of standing goes to the heart of jurisdiction in this Court. Deponent respectfully submits that in view of the lack of standing of MR. SILVERMAN to appeal, that the Court does not have jurisdiction to hear the appeal unless the Court grants leave to appeal.

LEAVE TO APPEAL SHOULD NOT BE GRANTED

10. Deponent submits that there is no justification for allowing the appellant to further impair and impede the progress of

the bankruptcy proceeding below, and to further delay and damage the parties involved in the settlement below.

11. The significance and damage resulting from the tactics employed by MR. SILVERMAN to date is substantial. Firstly, there has been a most substantial loss of income to date, insofar as the Trustee is concerned. As part of the settlement, the Trustee is to receive $108,000. in cash which, over the period of time that the settlement has been delayed, would have yielded in excess of $15,000. to date, by way of interest, simply earned on certificates of deposit. Deponent knows this of his own personal knowledge.

12. Insofar as one of the other parties to the settlement, MRS. ZELDA COHEN (the mother-in-law of deponent's client) is concerned, she was to receive back her 822 shares of American Telephone & Telegraph, worth approximately $40,000.00. Although MRS. COHEN has been receiving dividends on this stock since the stock is and always has been registered in her name, she nevertheless has not been able to dispose of the stock in any way. This is especially significant in her opinion, because she has been the victim of malignant cancer and has had extensive surgery in an effort to save her life. MRS. COHEN has requested a number of times that the stock be delivered to her, as she wishes to dispose of it. I personally have had conversations with MRS. COHEN and have told her that the stock cannot be delivered until the settlement is finalized.

13. Insofar as MICHAEL E. GREEN is concerned, it is to be noted that the principal reason for making the settlement offer by MICHAEL E. GREEN was not because of any fear of an adverse determination of the claims against him. It was always, and still is, deponent's opinion that the Trustee could not prevail in any of his claims against MR. MICHAEL E. GREEN. MR. MICHAEL E. GREEN's motive for agreeing to the settlement was two-fold.

14. Firstly, it was based upon the expense in the proceeding, which appeared to be considerable, and unfortunately it has, since the settlement agreement, also been considerable because of the tactics employed by appellant. Even more important, however, is the fact that MR. MICHAEL E. GREEN, as a member of various commodity exchanges, was suspended from various exchanges because he was the principal officer of the bankrupt corporation, and he could not apply for reinstatement in many of these exchanges unless and until the outstanding claims against him were disposed of either by judgment in his favor, by settlement, or by payment of all claims made against him if they were reduced to judgment. The principal reason for the settlement offer by MR. MICHAEL E. GREEN has now been substantially watered down by the extraordinary delay occasioned by the tactics of appellant. It is apparent that the delay involved herein, and the continuing delay by this appeal, has caused and will continue to cause damage to deponent's client, as well as others.

15. For all of the reasons set forth above, deponent respectfully submits that SILVERMAN should not be allowed to go forward with this appeal in which he is not directly interested, but which is obviously part of a strategy of litigation to help him in his personal case brought against him by the Trustee. Leave to appeal should be denied.

AS A DEFAULTING PARTY BELOW, APPELLANT IS LIMITED TO SPECIFIC ISSUES. APPELLANT PROPOSES TO RAISE ON THIS APPEAL ISSUES WHICH HE MAY NOT RAISE

16. The determination of JUDGE POLLACK upon deponent's motion to dismiss the appeal, allowed appellant to appeal in a very limited fashion. On the motion to dismiss the appeal before JUDGE POLLACK, the issue was raised that as a defaulting party, appellant did not have the right to appeal, but his remedy, if any, was relegated to an application before the Bankruptcy Court to vacate such default. This is, of course, the general rule of law throughout the United States.

17. JUDGE POLLACK found an exception to this rule. By citation of cases, the learned Judge showed that a defaulting party has a limited right of appeal. In his memorandum decision JUDGE POLLACK referred to certain cases which hold that a defaulting party may prosecute a timely appeal from a default judgment but only to the extent that he may appeal from that which is not in conformity with the pleading or from relief obtained

greater in scope than the process or pleading served.

18. In the case at bar, the issues proposed to be raised by the appellant do not deal with the scope of the petition or a claim that the order of the Bankruptcy Court gave relief not sought or greater than sought, or that the relief obtained was not otherwise in conformity with the petition. The appellant seeks a traditional appeal based upon the contention that the Bankruptcy Court and the District Court erred in the determination of the issue. This is not a subject which can be raised by a defaulting party.

AS TO A BOND

19. Deponent, as aforesaid, believes that there is no basis for this appeal. If, however, the Court feels that the appeal should go forward then, in that event, deponent believes that a substantial bond should be required. In view of all the facts and circumstances involved, the parties involved and the damage to all of them by the dilatory tactics employed, deponent believes that appellant should be required to post a bond in the amount of $50,000.00.

WHEREFORE, deponent respectfully prays that the appeal herein be dismissed.

Martin Szold

Sworn to before me this
2nd day of June, 1975.

JULES W. SCHAPIRO
NOTARY PUBLIC, State of New York
No. 30-8791015
Qualified in Nassau County
Commission Expires March 30, 1976

Index No. 70-B-464 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
MAR 24 1975
S. D. OF N. Y.

70-B-464

In re M. E. GREEN CO. INC.,

Bankrupt

Endorsement
Motion to Dismiss Appeal is Granted as to Items "1" and "3" and denied as to Item "2"
So Ordered
3/18/75
Milton Pollack
USDJ

NOTICE OF MOTION TO DISMISS APPEAL, AND
AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL

SZOLD, SCHAPIRO & COSTER

Attorneys for Michael E. Green

342 MADISON AVENUE
NEW YORK, N. Y. 10017
(212) [illegible]-1560

See: Rules 801, 802 Bankruptcy Rules and as to Item #2, See Hopkins v. McClure, 148 F2d 676, 679 (10th Cir 1945) Citizens by admitted. City of New Haven v. Gallagher 84 F2d 285, Ohio Central RR v. Central Trust Co. 133 US 83, Thomson v. Wooster 114 US 104 (1885).

To:

Attorney(s) for

Service of a copy of the within

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

☐ NOTICE OF ENTRY that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on 19

☐ NOTICE OF SETTLEMENT that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the Judges of the within named Court, at on 19 , at M.

Dated:

EXHIBIT 1

SZOLD, SCHAPIRO & COSTER

Attorneys for

342 MADISON AVENUE
NEW YORK, N. Y. 10017

#1

EVG

Index No. 75 - 5009 *Year 19*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of

M. E. GREEN CO. INC.,

Bankrupt.

NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS, AND IN OPPOSITION TO MOTION FOR SUPERSEDAS

Attorneys for **SZOLD, SCHAPIRO & COSTER**
MICHAEL E. GREEN, Appellee,

342 MADISON AVENUE
NEW YORK, N. Y. 10017
(212) 661-1560

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

SZOLD, SCHAPIRO & COSTER

Attorneys for

342 MADISON AVENUE
NEW YORK, N. Y. 10017

To:

Attorney(s) for

N 912 CL